Gerry Di Ponio & Sons, Inc. *and* International Union of Operating Engineers, Local No. 324, 324–A, 324–B and 324–C, AFL–CIO. Case 7–CA–19445

March 31, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

Upon a charge filed on June 17, 1981, by International Union of Operating Engineers, Local No. 324, 324-A, 324-B and 324-C, AFL-CIO, and duly served on Respondent Gerry Di Ponio & Sons, Inc., the General Counsel of the National Labor Relations Board, by the Regional Director for Region 7, issued a complaint on August 31, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1), Section 8(d), and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges that Respondent has violated and is violating Section 8(a)(5) and (1) of the Act by failing and refusing, since March 1, 1981, to make payments to reduce its indebtedness to the Operating Engineers Fringe Benefit Funds in accordance with an agreement executed on January 30, 1981; by failing and refusing, since January 1981, to submit fringe benefit reports to the trustees of the Fringe Benefit Funds in accordance with the terms of the collective-bargaining agreement executed on August 24, 1974; by failing and refusing, since December 17, 1980, to remit to the trustees currently due fringe benefit contributions on behalf of the unit employees; and by unilaterally changing and modifying the provisions of its collective-bargaining agreement and its agreement to reduce its indebtedness without complying with the notice requirements of the collective-bargaining agreement and/or Section 8(d) of the Act. Respondent failed to file an answer to the complaint.

On November 2, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on November 18, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent did not file a response to the Notice To Show Cause and, therefore, the allegations in the Motion for Summary Judgment stand uncontroverted.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations, Series 8, as amended, provides:

> The respondent shall, within 10 days from the service of the complaint, file an answer thereto. The respondent shall specifically admit, deny, or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. All allegations in the complaint, if no answer is filed, or any allegation in the complaint not specifically denied or explained in an answer filed, unless the respondent shall state in the answer that he is without knowledge, shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown.

The complaint and notice of hearing duly served on Respondent herein specifically states that unless an answer to the complaint is filed within 10 days of service thereof "all of the allegations in the Complaint shall be deemed to be admitted true and may be so found by the Board." As noted above, Respondent has failed to file a response to the Notice To Show Cause. According to the Motion for Summary Judgment, on September 21, 1981, the Regional attorney for Region 7 mailed a letter to Repondent giving it until October 1, 1981, to file an answer, and stating that failure to do so would result in filing of a Motion for Summary Judgment. No answer has been filed.

Accordingly, under the Board's Rule set forth above, no good cause having been shown for the failure to file a timely answer, the allegations of the complaint are deemed admitted and are found to be true, and we shall grant the General Counsel's Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Gerry Di Ponio & Sons, Inc., is, and has been at all times material herein, a corporation duly orga-

nized under, and existing by virtue of, the laws of the State of Michigan. At all times material herein, Respondent has maintained its principal office and place of business at 745 Randolph, Apartment 224, in the city of Northville, and State of Michigan. At all times material herein, Respondent has maintained, from time to time, other places of business at construction sites within the State of Michigan. Respondent is, and has been at all times material herein, engaged in the construction industry as an underground contractor.

During the year ending December 30, 1980, which period is representative of its operations during all times material herein, Respondent, in the course and conduct of its business operations, purchased and caused to be transported and delivered at its Michigan construction sites pipes, fittings, valves, manhole coverings, heavy machinery parts, and other goods and materials valued in excess of $50,000, which were received from other enterprises including, *inter alia*, Price Brothers and Bitten Bros., located in the State of Michigan, each of which other enterprises had received the said goods and materials delivered to Respondent directly from points located outside the State of Michigan. During the same period, Respondent, in the course and conduct of its business operations, performed services valued in excess of $500,000 for various municipalities, including the city of Garden City, Michigan, and the city of Farmington, Michigan.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

International Union of Operating Engineers, Local No. 324, 324-A, 324-B and 324-C, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The 8(a)(5) and (1) Violations*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All operating engineers, mechanics, master mechanics, oilers and apprentice engineers employed by Respondent at its various construction sites in the State of Michigan, but excluding guards and supervisors as defined in the Act.

2. The representative status of the Union

Since August 24, 1974, and at all times material herein, the Union has been the designated and the recognized exclusive collective-bargaining representative of Respondent's employees in the unit described above. Such recognition is embodied in a collective-bargaining agreement dated August 24, 1974, whereby Respondent agreed to abide by the wage rates, fringe benefits, working rules, and classifications as set forth in the most current master collective-bargaining agreement between the Associated Underground Contractors, Inc., and the Union, the most recent of which is effective by its terms from September 1, 1980, to September 1, 1983. The Union has been the majority designated representative for purposes of collective bargaining of the employees in the unit described above, and, by virtue of Section 9(a) of the Act, has been, and is now, the exclusive bargaining representative of all employees in said unit for the purpose of collective bargaining with respect to wages, rates of pay, hours, and other terms and conditions of employment.

B. *The Refusal To Bargain*

The collective-bargaining agreement between Respondent and the Union provides, *inter alia*, that the parties shall be bound by the terms and conditions negotiated in each successive master agreement unless notice to terminate or amend the agreement is served on the other party in writing not more than 90 nor less than 60 days prior to the termination date of the current master agreement. At no time material herein has either Respondent or the Union served notice of amendment or termination of the agreement. The master agreement between the Associated Underground Contractors, Inc., and the Union provided, *inter alia*, that each employer bound thereby shall make regular monthly contributions to the trustees of the Operating Engineers Fringe Benefit Funds for work performed by its employees covered by said agreement, for purposes of certain insurance, vacation, pension, and other benefits for said employees, and, further, shall furnish to the trustees, upon request, such information and reports as the trustees may require in the performance of their duties, and shall permit said trustees or their authorized agents to perform an audit and have access to such records as may be necessary to determine whether or not the employer is complying in full with its obligations regarding fringe benefit contributions. In addition, at all times material herein, each covered

employer is required to submit to the trustees monthly fringe benefit reports reflecting the payroll records for its employees covered by said agreement.

In January 1981, an audit of Respondent's payroll and other records disclosed that Respondent was delinquent in its fringe benefit payment obligations of 1978, 1979, and 1980. Thereafter, on January 30, 1981, Respondent and the Union entered into a contract under which Respondent acknowledged an indebtedness to the Fringe Benefit Funds in the amount of $20,487.45 and agreed to make monthly payments, commencing on February 1, 1981, to satisfy said past due indebtedness. Respondent made the first monthly payment as required by the contract but thereafter made none of the other required payments. Furthermore, since on or about March 1, 1981, Respondent has failed and refused to submit the required monthly fringe benefit reports. Since on or about December 17, 1980, and March 1, 1981, respectively, Respondent has failed and refused to remit currently due fringe benefit contributions on behalf of the unit employees, and past due contributions to reduce its indebtedness, to the trustees. In addition, Respondent has unilaterally changed and modified the provisions of its collective-bargaining agreement, and its subsequent agreement to satisfy its indebtedness, without complying with the notice requirements of said agreement and/or Section 8(d) of the Act.

Accordingly, we find that Respondent, by the conduct described above, since December 1980, and at all times thereafter, has refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act. We also find that Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, its employees in the exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act. Finally, we find that by unilaterally changing and modifying the provisions of its collective-bargaining agreement and its subsequent agreement to reduce its indebtedness, without notice to the Union, in violation of Section 8(d) of the Act, Respondent has also violated Section 8(a)(5) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) and Section 8(d) of the Act, we shall order that it cease and desist therefrom, and that it take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent has failed and refused to remit fringe benefit contributions and to furnish fringe benefit reports both under the terms of the current collective-bargaining agreement and its January 30, 1981, agreement to reduce its indebtedness to the Fringe Benefit Funds, we shall order that it do so, and also order that it make the unit employees whole for any loss of benefits they may have suffered by reason of Respondent's failure to comply with its contract obligations.[1]

CONCLUSIONS OF LAW

1. Gerry Di Ponio & Sons, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Union of Operating Engineers, Local No. 324, 324-A, 324-B and 324-C, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following described employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All operating engineers, mechanics, master mechanics, oilers and apprentice engineers employed by Respondent at its various construction sites in the State of Michigan, but excluding guards and supervisors as defined in the Act.

4. At all times material herein, the above-named labor organization has been and now is the exclu-

[1] Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide for interest at a fixed rate on fund payments due as part of a "make-whole" remedy. We therefore leave to further proceedings the question of how much interest Respondent must pay into the benefit fund in order to satisfy our make-whole remedy. These additional amounts may be determined, depending on the circumstances of each case, by reference to provisions in the documents governing the fund at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses. See *Merryweather Optical Company*, 240 NLRB 1213, 1216 at fn. 7 (1979).

sive representative of all employees in the aforesaid unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By unilaterally ceasing to furnish monthly fringe benefit reports and payments to the trustees of the Operating Engineers Fringe Benefit Funds under the terms of its collective-bargaining agreement, and by refusing to make monthly payments to the Fringe Benefit Funds under the terms of its January 1981 agreement to reduce its indebtedness to the Fringe Benefit Funds, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. By unilaterally modifying the terms of its agreements with the Union, without notice to the Union as required by its agreements and/or Section 8(d) of the Act, Respondent has also violated Section 8(a)(5) and (1) of the Act.

7. By the above-mentioned conduct, Respondent did interfere with, restrain, coerce, and is interfering with, restraining, and coercing, its employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby did engage in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(1) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Gerry Di Ponio & Sons, Inc., Northville, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing and refusing to abide by the terms of its January 30, 1981, agreement to make monthly payments to satisfy its past due indebtedness to the Operating Engineers Fringe Benefit Funds.

(b) Failing and refusing to submit to the trustees of the Fringe Benefit Funds the monthly reports reflecting the payroll records for its employees covered by the collective-bargaining agreement.

(c) Failing and refusing to remit to the Fringe Benefit Funds currently due fringe benefit contributions on behalf of the unit employees.

(d) Unilaterally changing and modifying the provisions of any agreements to which it is a party without complying with the notice requirements of said agreements and/or Section 8(d) of the Act.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment.

(b) Submit all delinquent fringe benefit reports and payments due under the January 1981 agreement and the collective-bargaining agreement to the trustees of the Operating Engineers Fringe Benefit Funds for the employees in the unit described above.

(c) Give effect to the terms of the above-mentioned collective-bargaining agreement and the agreement to reduce its indebtedness to the Operating Engineers Fringe Benefit Funds and make the unit employees whole for any loss of benefits they may have suffered, by paying all Fringe Benefit Funds contributions, as provided by the terms of said agreements, which have not been paid and which would have been paid absent Respondent's unlawful unilateral discontinuance of such payments.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of contributions due under the terms of this Order.

(e) Post at its facility in the State of Michigan copies of the attached notice marked "Appendix."[2] Copies of said notice, on forms provided by the Regional Director for Region 7, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

---

[2] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, hours of employment, and other terms and conditions of employment with International Union of Operating Engineers, Local No. 324, 324-A, 324-B and 324-C, AFL-CIO, or any other union selected as the exclusive bargaining representative of our employees. The bargaining unit is:

All operating engineers, mechanics, master mechanics, oilers and apprentice engineers employed by us at our various construction sites in the State of Michigan, but excluding guards and supervisors as defined in the Act.

WE WILL NOT fail or refuse to abide by the terms of our January 30, 1981, agreement to make monthly payments to satisfy our past due indebtedness to the Operating Engineers Fringe Benefit Funds.

WE WILL NOT fail or refuse to submit the required fringe benefit reports reflecting the payroll records for our employees covered by the collective-bargaining agreement.

WE WILL NOT fail or refuse to remit currently due fringe benefit contributions on behalf of unit employees.

WE WILL NOT unilaterally change or modify the provisions of any agreements to which we are a party without complying with the notice requirements of said agreement and/or Section 8(d) of the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their Section 7 rights.

WE WILL, upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the above-described unit with respect to rates of pay, wages, hours, and other terms and conditions of employment.

WE WILL submit all delinquent fringe benefit contributions and reports to the Union and make appropriate contributions to the Operating Engineers Fringe Benefit Funds for the employees in the appropriate unit.

WE WILL give effect to the terms of the above-described agreements and make the unit employees whole for any loss of pay or benefits they may have suffered by reason of our failure to comply with the terms of said agreements.

GERRY DI PONIO & SONS, INC.